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# California Partnership Law and the Uniform Partnership Act

(CONTINUED FROM MARCH ISSUE.)

## XXXVII. DISSOLUTION AND WINDING UP.

U. P. A. sections 29 to 43, fifteen in number, relate to the above subject. Most of them contain many paragraphs and subsections. Civil Code sections 2449 to 2454 and 2458 to 2462, eleven in number, relate to the same topics, and have few subsections. There is a striking difference in the amount of space devoted to this important branch of partnership law. The Civil Code merely sets guideposts here and there, leaving much to the common law. The U. P. A. furnishes a nearly complete code. Furthermore, on many of the points covered by the U. P. A. there is no decision in California. The adoption of the U. P. A. means an expansion of codified law on doubtful points and will furnish a guide to the puzzled in threading the maze of questions raised by even the simplest dissolution.

## XXXVIII. DISSOLUTION DEFINED.

U. P. A. SECTION 29. The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

Parallel reference: C. C. § 2458, cf. §§ 2449-2453, 2459-2462.

This section and the next are mainly of definition, and definition of the two terms "dissolution" and "termination" is desirable. The term "dissolution" in the Civil Code is generally given the same meaning as here, for it will appear from an examination of Civil Code sections 2449-2453 that what is being discussed under the word in question is, what facts change a relationship of partners to that of non-partners. Similarly the term "winding-up" in the U. P. A. covers exactly the same ground as the term "liquidation" in the Civil Code. So far, there is no change in theory, but merely the substitution of an Anglo-Saxon for a Latin word, but the precise use of the word "termination" in the U. P. A. finds no parallel in the Civil Code, where this word, though used in the title to the Article V and in section 2453, means the same thing as dissolution. The confining of "termination" to a specific event different from dissolution will add precision to

our loose legal vocabulary. It will be noticed that dissolution does not end the partners' relation to each other as partners. This is already law in California.<sup>126</sup>

#### XXXIX. PARTNERSHIP NOT TERMINATED BY DISSOLUTION.

U. P. A. SECTION 30. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

Parallel references: cf. C. C. § 2458; cf. also Title to Art. V, and § 2453.

This section has no counterpart in the Civil Code, as has been stated in the preceding paragraph. The doctrine here expressed—that the partnership does not cease to exist on “dissolution” but continues with limited powers is explicit in C. C. section 2458. The legal situation of partners and third parties during this period of liquidation or winding up—that is, from dissolution until termination as the U. P. A. here puts it—will be discussed in later paragraphs.<sup>127</sup>

#### XL. CAUSES OF DISSOLUTION

U. P. A. SECTION 31. Dissolution is caused:

(1) Without violation of the agreement between the partners,

(a) By the termination of the definite term or particular undertaking specified in the agreement.

(b) By the express will of any partner when no definite term or particular undertaking is specified,

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking.

(d) By the expulsion of any partner from the business *bona fide* in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

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<sup>126</sup> Cal. Civ. Code, § 2458; *Braun v. Woollacott* (1900) 129 Cal. 107, 61 Pac. 801; cf. *Sears v. Starbird* (1889) 78 Cal. 225, 20 Pac. 547; *Steinback v. Smith* (1917) 34 Cal. App. 223, 167 Pac. 189; *Marye v. Jones* (1858) 9 Cal. 335. Similarly, death does not “terminate”: *People ex rel. Allen v. Hill* (1860) 16 Cal. 113; cf. *Little v. Caldwell* (1894) 101 Cal. 553, 36 Pac. 107, 40 Am. St. Rep. 89. Of course on dissolution, the obligations of the partners *inter se* are varied: see under paragraph XLII, to appear.

<sup>127</sup> See paragraph XLVII.

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under section 32.

Parallel references:

to subsection 1 (a) : C. C. § 2450 (1)

to subsection 1 (b) : C. C. § 2450 (2)

to subsection 1 (c) : none

to subsection 1 (d) : none

to subsection 2 C. C. § 2451, § 2450 (2); cf. C. C.  
[§ § 2417, 2418.

to subsection 3 : Cf. C. C. § 2450(5)

to subsection 4 : C. C. § 2450(3)

to subsection 5 : Cf. C. C. § 2450(4)

to subsection 6 : C. C. § 2450(6)

In general also cf. C. C. § § 2417, 2449.

The numbering of the subsections of this paragraph must be noticed to comprehend it. A distinction is made between dissolutions caused by acts in contravention of the partnership agreement and those caused by acts not in such contravention, not so much because the distinction is important here but as a foundation for the rules laid down in later sections. Then follow four other causes of dissolution, but without a statement whether they have this effect when the event mentioned is in violation of partnership agreement or not. A captious critic might suggest that these last four causes really constitute a class by themselves, that is, causes that operate irrespective of whether or not in violation of the partnership agreement. Like the U. P. A., section 2450 of the Civil Code, in defining causes for dissolution, does not, except as to subsection 2, take into account at all whether such cause was an act in violation of the partnership agreement or not. But subsection 2, taken in connection with C. C. section 2451, does make the same classification made in U. P. A. section 31, (1) and (2), and for the same reasons, that is, to make it clear that although dissolution may take place as the result of an act in contravention of the partnership articles, such an act does not free the active partner from liability to his copartners for such contravention. It is so provided in U. P. A. section 38(2) and also in C. C. section 2451. This last section of the

Civil Code does, however, prescribe a different effect to dissolution in contravention of the articles from that prescribed in the U. P. A., and in this respect the adoption of the latter will change the law, as will appear in connection with the discussion of U. P. A. section 38(2).<sup>128</sup>

(1) Clause (a). Subsection (1) clause (a) of U. P. A. section 31 provides for dissolution at a time agreed upon and specifies not only the case where a time is set but also that where a particular venture is undertaken. The corresponding subsection of Civil Code section 2450, namely subsection 1, it might be asserted, covers only the first situation, and it might therefore be contended in California that when a particular venture is undertaken there is no partnership for a fixed term, but only a partnership at will, because no time is "prescribed by agreement." This argument is weakened somewhat by the language of C. C. section 2451 which speaks of agreements for continuance apparently as identical with "time prescribed by agreement for its duration," but the question is at least doubtful. The inclusion of such ventures within the class of dissolutions that may give rise to an action for damages seems on the whole desirable.<sup>129</sup> A partner who participated in them ought to be able to count on the continued activity of his copartners until it is finished, and to recover damages for a withdrawal. On the other hand, what is a "particular undertaking"? If two men become partners as lawyers or as grocers, probably no one will argue that their day-by-day business is a particular undertaking, but suppose they become such as farmers or ranchers for a particular crop; is there a "particular undertaking" in this case, enduring until the first crop is raised or marketed? It would seem that the way is opened for litigation over some difficult questions of fact. However, this is less troublesome than the situation at present, because we now may

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<sup>128</sup> Cases involving this sort of question are rare. Only once in this state has the question as to dissolution of a partnership for a fixed term been passed upon in a reported case: *Von Schmidt v. Huntington* (1850) 1 Cal. 55, which was decided before the Civil Code went into effect and its strict rule is no longer law. In general see *Burdick*, p. 344.

<sup>129</sup> See *Burdick*, p. 343. In *Whitley v. Bradley* (1910) 13 Cal. App. 720, 110 Pac. 596, the question was left open. In *Spencer v. Barnes* (1914) 25 Cal. App. 139, 142 Pac. 1088, it was held unnecessary to pray for a dissolution in a case where there was a partnership for a particular venture which had been accomplished. But this case does not answer the question as to what would have happened if one partner had elected to dissolve it before accomplishment of the purpose.

have not only this question but also the question whether particular undertakings are included at all.

(b) Clause (b) is almost identical with C. C. section 2450(2), but the former refers to "express will" and the latter to "expressed will." Under the Civil Code it is clear that the partner desiring to withdraw must, so to speak, publish his intention or will to withdraw, that is, the mere intention to withdraw is not enough to work a dissolution, but under the U. P. A., since the word "express" may carry the idea of definiteness and no more, and does not necessarily mean definitely stated (Webster), the need of publication is not quite so clear. The Civil Code on this very minor point seems slightly preferable.<sup>130</sup>

(c) Clause (c) has no counterpart in the Civil Code. Singularly enough, the latter makes no provision for the dissolution of a partnership by the expressed will of all the partners, though, of course, this must be a cause of dissolution.<sup>131</sup> The U. P. A., however, provides for such a case, but with a careful limitation, from which several rather difficult questions arise. If there are three partners and one has assigned his interest, and the partnership is not for a fixed term, clause (b) if taken by itself would seemingly apply to all three, for the last part of clause (c) leads one to infer that the existence of a fixed term is a condition to its operation. Yet this is none too clear. Is it not open to argument that the last part is not intended to create a condition which must exist before the dissolution can occur but to provide in effect that the dissolution can always be effected by the express wills of all the partners who have not assigned their interests even when the case is one of a fixed term? If so, clause (c) limits the application of clause (b). Indeed, is there not quite as much reason why clause (c) should apply in the case of a partnership originally at will as that it should apply in the case

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<sup>130</sup> An assignment by one partner to another does not fall under this section: *Chapman v. Hughes* (1894) 104 Cal. 302, 37 Pac. 1048. An agreement for the dissolution, of course, often contains a contract settling the partners' rights, which contract may be rescinded if obtained by fraud. Courts in such situations, sometimes loosely speak as though such rescission did away with the dissolution. The dissolution being the result of express will of at least one partner would stand. See *Arnold v. Arnold* (1902) 137 Cal. 291, 70 Pac. 23; *Rowe v. Simmons* (1896) 113 Cal. 688, 45 Pac. 983.

<sup>131</sup> As when one partner sells out to the other: *Brush v. Maydwell* (1859) 14 Cal. 208, and of course such an agreement may be implied: *Rowe v. Simmons*, *supra*, n. 130. Partnership held dissolved upon assignment for benefit of creditors: *Wells v. Ellis* (1885) 68 Cal. 243, 9 Pac. 80.

of one for a fixed term after the term has expired? There is perhaps room for litigation in the case put, when the partner who has assigned his interest expresses a will to dissolve and the others contend he is debarred under the provision of clause (c). The partner assigning will rely on clause (b); the others upon the interpretation of clause (c) that applies it to partnerships at will and upon U. P. A. section 32(2) clause (b), which, vesting the right in the assignee, seemingly takes it out of the assignor.<sup>132</sup> The existence of the U. P. A. section 32, of course, robs the question of much of its practical importance, but a case may well arise. Suppose again in the case put—three partners in a partnership at will, one having assigned—that a dissolution and the necessary winding-up would work great harm because perhaps the name of the assigning partner gives the partnership much of its value; the first unsettled question will be whether the assigning partner can dissolve the firm; the second, whether, if he can do so, his act falling under clause (b) does not expose him to liability, or not falling under that subsection, does expose him to liability; and the third, how such liability can be worked out.

Again, clause (c) refers to the express will of all the partners. Must this will be a joint act? The question is not answered and is of slight importance, for usually if all want to withdraw then when the last so agrees, they are all of one mind at once. But suppose in the case of a partnership of two for a term, they quarrel and one has the necessary express will. The partnership would seemingly be dissolved under subsection (2), and the partner who had the will would be liable in damages. Can the defendant partner bring the case under clause (c) by showing that later his former copartner's will was for dissolution? Probably not, for a will to dissolve dissolves and the later will has nothing to operate upon. There is at least a technical right of action.

The foregoing suggestions must not be allowed to obscure the real merits of this clause. The usual case will be that of a partnership for a term not expired and an assignment, let us say, by one out of three. The remaining two certainly should have the right to dissolve without liability to the assignor or assignee, for they have practically lost their fellow, and the chances are that he has lost interest. The U. P. A. gives them a right to dissolve in clear terms, and it equally preserves to them the

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<sup>132</sup> See paragraph XLI.

right to go on as the old partnership unless it be held that the assignor partner or his assignee can dissolve under subsection (2), in which case there will be compensation to them in damages (U. P. A. section 38, subsection 2). Is the Civil Code equally explicit? Section 2450(4) declares that a transfer dissolves, presumably *ipso facto*.<sup>133</sup> Section 2451 gives a right of action for damages when a partnership is dissolved by expressed will contrary to an agreement for its continuance. Is a transfer such an expression of will? If not, a partner can escape liability under section 2451 by not "expressing his will" but by making a transfer to some third person. The cases give no answer, and the question is open. But even if such expression takes place by transfer or otherwise, and the right to damages accrues, the Civil Code presents further difficulties, for the partnership is dissolved as to the withdrawn partner only under section 2451. What does this mean? Does it mean that the old partnership, now minus one man, continues, and that creditors before and after the withdrawal are creditors of the same firm? This is contrary to all our fundamental ideas of partnership law. Or does it mean that the non-transferring partners continue as partners in a new firm without further agreement, and as such are entitled to retain all the assets of the old firm until the end of the term? No satisfactory answer can be given to these questions. All the advantage of clarity is with the U. P. A.

(d) Clause (d) also has no counterpart in the Civil Code. The Commissioners offer no explanation of its presence in the U. P. A. If a power to expel a partner be given in the articles, it would seem that from such an agreement it would necessarily follow that an expulsion in accordance with the power would not be in violation of the agreement. This would be so without a code provision making it so. The subsection does, however, make it clear that an expulsion made bona fide has this effect, presumably even though the cause for expulsion relied upon did not actually exist.

(2) There is a split in the authorities as to whether or not a partner can bring about dissolution short of a period prescribed in the articles.<sup>134</sup> U. P. A. section 31(2) takes the view that he can, though exposing himself to liability in damages under U. P. A.

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<sup>133</sup> See paragraph XXXV.

<sup>134</sup> The majority view in the United States permits such dissolution. Burdick p. 344.



section 38(2). This choice, however, is that already made by C. C. section 2451, one means of such dissolution appearing also in section 2417,<sup>135</sup> and therefore no change will be made in the law by adopting the U. P. A., except as to the effects of such dissolution on third parties in the way just pointed out.

The subsection places this power of dissolution in "any partner at any time." Will this include a partner who has transferred his interest? U. P. A. section 32(2) gives this power to the purchaser only after the termination of the fixed term or when the partnership is at will. The purchaser, in short, has not this right when the partnership is for a term. The transfer has not *ipso facto* worked a dissolution; can the transferring partner avail himself of subsection (2)? If so, can the transferee compel him to do so, regarding this right as an asset transferred? If so, U. P. A. section 32(2) is defeated as to its inferential rule. The U. P. A. is none too clear upon these points, but would seem to be preferable to the Civil Code, under which, as already noted, it is clear that a transfer does *ipso facto* dissolve even a partnership for a fixed term, but doubtful whether or not this exposes the active partner to liability. Under U. P. A. section 31, a transfer is not among the causes mentioned as an act itself working a dissolution, and section 27(1) provides that it does not. In short, to bring U. P. A. section 31(2) into operation there must be also an act of express will, and the right to damages is preserved in such case. Under C. C. sections 2451 and 2450(4) we are driven into the dilemma of holding either that the transfer *ipso facto* dissolves, rendering expressed will irrelevant, destroying the right to damages, and giving the transferring partner a method of defeating section 2451—a result unfair to the other partners—or that the transfer is itself an act of expressed will bringing that section into operation and giving the non-active partners a right to damages, even though no dissolution was intended—a result that may be quite unfair to the transferring partner. The middle ground provided for under the U. P. A. seems impossible under the Civil Code, if logically applied.

(3) This subsection covers much more ground than C. C. section 2450(5), which is limited to war and the prohibition of commercial intercourse, while the U. P. A. seemingly includes not only what is covered there but also other events. It may, for

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<sup>135</sup> Lewis, 24 Yale Law Journal, 627.

example, become unlawful to manufacture a certain article. The subsection says this event dissolves the partnership, whereas the Civil Code is silent, and leaves one wondering whether a court action for dissolution is or is not necessary and if necessary, under what section to bring it.<sup>136</sup>

The subsection should be recalled in connection with the definition of a partnership (U. P. A. section 6), where the requisite of lawfulness is omitted in order to safeguard the rights of creditors and even partners where their business is not wholly unlawful. An orderly winding up of such partnership should take place when it is to the advantage of innocent creditors, and this cannot be if there is no partnership. Nor should a partner forfeit all rights.<sup>137</sup>

(4) This subsection is identical with C. C. section 2450(3). California is exceptional in providing in effect that the death of a principal does not necessarily destroy an agent's power (C. C. section 2355). The general rule of partnership law is that death terminates a partner's power to bind the estate of a deceased partner. Is this the law in California in view of the provisions of C. C. section 2355, that is, would a partner be regarded as an agent is regarded? The U. P. A. makes clear this question, as the Civil Code does not.<sup>138</sup>

The U. P. A. lays down categorically that "Dissolution is caused . . . by the death of any partner." Does this rob of their intended force agreements that death shall not dissolve? The same question arises under the Civil Code.<sup>139</sup>

(5) This subsection has no exact counterpart in the Civil Code, but section 2450(4) must certainly apply to transfers in bankruptcy, since these involve transfers "to a person, not a partner." (Assuming a copartner is trustee in bankruptcy, it could scarcely be alleged that section 2450(4) did not apply.) The U. P. A., therefore, will not change our law.

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<sup>136</sup> In *Chateau v. Singla* (1896) 114 Cal. 91, 45 Pac. 1015, 55 At. St. Rep. 63, 33 L. R. A. 750, no action for dissolution and accounting was allowed by one partner against his fellow when their business (sole business) was letting certain premises for immoral purposes. It does not appear whether the Court would apply this rule when the plaintiff was innocent, or when the business was partly innocent as to the innocent part, or would have allowed creditors relief on a partnership basis.

<sup>137</sup> See *Central Trust & Safe Deposit Co. v. Respass* (1902) 112 Ky. 606, 66 S. W. 421, 56 L. R. A. 479, 99 Am. St. Rep. 317; *Fryer v. Harker* (1909) 142 Iowa 708, 121 N. W. 526, 23 L. R. A. (N. S.) 477, and notes in 99 Am. St. Rep. 317 and 23 L. R. A. (N. S.) 477.

<sup>138</sup> See also paragraph XLIII.

<sup>139</sup> *Burdick* p. 341. See *Thompson v. Gibbs* (1865) 1 Cal. Unrep. 173.

Had the Commissioners wished to make a change, they might well have done so here. Why should the bankruptcy of a partner, assuming the rest to be solvent, be a greater dissolvent of the partnership than a transfer for the benefit of creditors or even to a purchaser? Under modern doctrines all that passes in any of these cases is his right to share in surplus, etc., and having parted with his financial interest he will be no more useful to his fellows because not bankrupt. The explanation seems to be rather historical than practical. Even when it was held that an ordinary transferee got no title to particular partnership assets, it was also held that the trustee in bankruptcy did acquire more. Precedent is all for holding that bankruptcy *ipso facto* dissolves, though reason may doubt. The Commissioners have preferred to adhere to precedent in this connection.<sup>140</sup>

(6) This subsection is but a prelude to the next section, just as Civil Code section 2450(6) is a prelude to section 2452.

#### XLI. DISSOLUTION BY DECREE OF COURT.

U. P. A. SECTION 32. (1) Application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(b) A partner becomes in any other way incapable of performing his part of the partnership contract,

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(e) The business of the partnership can only be carried on at a loss,

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under Sections 28 or 29:<sup>141</sup>

(a) After the termination of the specified term or particular undertaking,

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

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<sup>140</sup> Burdick p. 341.

<sup>141</sup> Sections 27 and 28 are evidently intended.

## Parallel references :

to subsection (1) (a) (b) C. C. § 2452 (1).

(1) (c) cf. C. C. § 2452 (2).

(d) C. C. § 2452 (2).

(e) C. C. § 2452 (3).

(f) none.

(2) (a) (b) cf. C. C. § 2451.

There is parallelism between U. P. A. section 32 and C. C. section 2452 just as there is between U. P. A. section 31 and C. C. section 2450, suggesting that the Commissioners had our Code before them to improve upon, but again the U. P. A. covers more ground than the Civil Code.

It should be noticed that we here have to do with matters which usually will arise only when a partnership is for a fixed term, and which do not themselves cause dissolution but merely entitle any partner to a judgment or decree of dissolution when established. Under the U. P. A., except subsection (1) clause (f), the court is left no discretion. Once the facts are established he is of right entitled to the decree. Seemingly the Civil Code is to the same effect, although its language is less decisive.

(1) clause (a). Under this subsection of U. P. A., if a partner is declared a lunatic in any judicial proceeding, his copartners are entitled to a decree of dissolution.<sup>142</sup> Apparently they have this right even if he is not in fact a lunatic. But do they have this right, if the partner in question is declared a lunatic in a decree that is later reversed? They can truthfully assert that he was declared such in a judicial proceeding. If the word "any" were not so emphatically inserted one would be tempted to believe that the right did not exist until appeals were exhausted or the chance to appeal gone. Is the holding of a court of first instance, though appealed from, such a taint on one partner as to justify his copartners in obtaining a decree of dissolution? There is perhaps enough reason for this view to raise a slight fear of litigation.

The subsection also provides that upon a showing of unsoundness of mind, the copartners may obtain a decree. The showing here referred to must presumably be made to the court hearing the application for dissolution. The last clause is aimed to cover other matters than the first. To illustrate: if a partner in a collateral action on a contract is found to have been of unsound mind and so not

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<sup>142</sup> See Burdick, p. 347.

liable, this finding can not avail the copartners, because otherwise the insertion of the first clause would be supererogation.

Civil Code section 2452 is not so definite, and raises several questions. Is evidence that a partner was insane or mentally incompetent to manage his property in a proceeding under C. C. P. sections 1763 and 1764 conclusive evidence that he is "legally incapable of contracting"? Under U. P. A. subsection (1) clause (a), it would be. In other words, C. C. section 2452 (1) does not expressly furnish a ready means of establishing cause for dissolution. A judge would probably wish to hear evidence of insanity and would be compelled to find that it was of a sort that brought the partner under these sections. When insanity has not been established collaterally, it would seem, however, that under U. P. A. and the Civil Code the copartners must proceed in the same way.<sup>143</sup>

(1) clause (b). A partner may be brought within the scope of this subsection in several ways. He may, for example, through his own guilt, go to jail and become civilly dead. In such case C. C. section 2452 (1) would apply as well as the subsection under discussion. But suppose through no fault of his own he was retained against his will in a foreign country, or shipwrecked? If the partnership were for a fixed term, his copartners could not themselves dissolve without exposing themselves to an action under C. C. section 2451, or obtain a decree of dissolution under section 2452. Yet in all fairness and justice they might be entitled to it. Under U. P. A. the court is in a position to grant them relief. On the other hand, does the power given them under this subsection go too far from the point of view of the partner no longer capable of performing his duty? If we recall that even if his conduct does not amount to abandonment (bringing into effect other operative provisions of both the Civil Code and U. P. A.)<sup>144</sup> nevertheless a partnership is really based on a co-operative principle, that the copartners are equally innocent, and that dissolution does not mean robbery of the absent or incapacitated one, we will concede that a broad rule such as this subsection lays down is in tune with fundamentals.

(1) clause (c). The conduct referred to in this subsection is evidently not that which is in breach of the partnership articles, for

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<sup>143</sup> The only California case of an insane partner does not decide any of these questions. *Isaac v. Jones* (1898) 121 Cal. 257, 53 Pac. 793.

<sup>144</sup> U. P. A. § 9 (3); C. C. § 2430. See Paragraph XV, 9 California Law Review, 132.

such breaches are governed by the next subsection. So considering it, we find the section's parallel in the last clause of C. C. section 2452 (2), although there is a slight difference in the tests laid down. "Serious misconduct" will usually affect prejudicially the carrying on of the business, but it may not, and also conduct having this affect may not be "serious misconduct." Unless we add an unexpressed qualification to the clause in the Civil Code, U. P. A. seems more logical. Suppose a partner's wife obtained a divorce from him for adultery; in some communities this would not affect the business prejudicially, but it might be serious misconduct. Should the copartners be entitled to a decree of dissolution? They would get it under the Civil Code, but not under U. P. A. Again, suppose a partner in a firm of bankers notoriously attended race meets in bad public odor, where gambling and betting was all but universal, though without betting or gambling himself. This is scarcely serious misconduct, and yet it might well affect the business prejudicially. The Civil Code would allow no decree of dissolution but U. P. A. would.

(1) clause (d). This subsection is more lenient to the wrongdoing partner than its parallel in C. C. section 2452 (2). Though the latter gives partners a right to a decree of dissolution when their copartner fails to perform his duties—the plural perhaps indicating that more than one breach is necessary—it apparently gives this right irrespective of the nature of the breach. If there are prescribed working hours and a partner is twice a half hour late, strictly speaking this evidence will satisfy the requirements of the Civil Code. U. P. A., on the other hand, requires something substantial and this seems to be the more reasonable rule.<sup>145</sup> Again, U. P. A. makes provision for dissolution in a class of cases where there is no breach of the partnership articles, where there is no conduct prejudicially affecting the business so far as outsiders are concerned, but where internal peace is impossible. In other words, the second clause of this subsection seems to contemplate situations where the habits or manners of a partner are such that it is impracticable to associate with him. In such case the others have a right to a decree of dissolution under U. P. A., but apparently not under the Civil Code. Such a right would seem desirable. In a partnership close association is required for success and partners should be free to break with a boor, or with a man who subtly disrupted discipline, or

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<sup>145</sup> Burdick, p. 348.

with like men, and to do so without exposing themselves to liability in damages to them.<sup>146</sup>

(1) clause (e). This subsection closely resembles C. C. section 2452 (3), but refers to "loss" and not to "permanent" loss, as is now the law with us. Because it is provided that the court *shall* decree a dissolution in these cases, U. P. A. at first glance seems rather too broad, but it should be remembered that it is the "business," presumably as a whole, and not single transactions, that must be carried on at a loss before the subsection is brought into effect; and that it would be absurd if the words used did not import also the idea of loss resulting only after some reasonable fiscal period of partnership activities. The objection vanishes, and turning to the Civil Code we are inclined to believe that it is too narrow, opening the way as it does to objections to dissolution based on the probability of profit at some far future period.<sup>147</sup>

(1) clause (f). C. C. section 2452 has no counterpart to this subsection, and C. C. section 2450 says only that a judgment of dissolution dissolves; but it would be absurd to hold that the power given by this subsection does not now exist in our courts.<sup>148</sup>

(2) The scope and effect of this subsection has already been considered in other connections.<sup>149</sup> It has no counterpart in the

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<sup>146</sup> See *Sutro v. Wagner* (1873) 23 N. J. Eq. 388. A case falling under C. C. § 2452 (2) is *Doudell v. Shoo* (1912) 20 Cal. App. 424, though dissolution was not actively opposed. The facts might also fall under U. P. A. § 32 (1) (c) or (d). Cases where dissolution was decreed for misconduct: *Crosby v. McDermitt* (1857) 7 Cal. 147 (wrongful retention of money); *Cottle v. Leitch* (1868) 35 Cal. 434 (falsifying accounts); *Smith v. Fagan* (1860) 17 Cal. 179 (wrongful exclusion); *Strong v. Stapp* (1887) 74 Cal. 280 (wrongful sale of some assets and departure from California with the rest). For a case in effect the reverse of these, where a partner prays not dissolution but reinstatement on the ground that dissolution was wrongful, because of fraud, see *Meyers v. Merillion* (1897) 118 Cal. 352, 50 Pac. 662, where, however, for peculiar reasons, the affirmative relief of reinstatement was not granted. See also *supra*, n. 130. A mere failure of one partner to do his agreed part does not terminate a partnership, nor prevent him from having an accounting: *Lanpher v. Warschauer* (1915) 28 Cal. App. 457. If a partner defrauds others in connection with sale of partnership assets to them, the proper remedy of one of those defrauded apparently is not a suit for dissolution because this involves the joining of several actions of fraud. *Behlow v. Fischer* (1894) 102 Cal. 208. This seems to be true even though all the defrauded persons join and assert the usual right of such persons to rescind the contract of sale, a result that seems startling. *Loftus v. Fischer* (1896) 114 Cal. 131.

<sup>147</sup> *Burdick*, p. 348.

<sup>148</sup> *Burdick*, p. 349. See also *Bates v. Babcock* (1892) 95 Cal. 479, 30 Pac. 605; *Miller v. Kraus* (1916) 155 Pac. 834 (Cal. App.) (partnership formed by fraud).

<sup>149</sup> See paragraphs XXXV, XXXVI, 9 California Law Review, 222, 224, and see Paragraph XL.

Civil Code and is necessary here because of rules of law which differ from those laid down there. Under the Civil Code no difficult problem is raised as to the right of a purchaser of a partner's share to obtain dissolution, because by the terms of C. C. section 2450 (4) the transfer to the purchaser *ipso facto* works a dissolution.<sup>150</sup> Again, there is not so much need to provide for him because he will not so often occur under the present California system permitting a separate creditor of one partner to attach specific partnership property, whereas under the charging order system of the Civil Code the purchase of a partner's share will often be the only security for a judgment that a creditor can obtain.

What does the purchaser obtain? Apparently only what his seller had. It seems to be assumed that the seller has no right to obtain a dissolution unless the partnership is at will, for otherwise that right would be mentioned. This should be borne in mind in interpreting the provisions of U. P. A. 31 (1) and (2). The omission of the right in the purchaser when the partnership is for a fixed term would seem to show that the right does not exist in the selling partner, for of what use is it to him? This would seem to carry the limitations of dissolving power expressed in U. P. A. section 31 (1) into section 31 (2).

## XLII. GENERAL EFFECT OF DISSOLUTION ON AUTHORITY OF PARTNER

U. P. A. SECTION 33. Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

(1) With respect to the partners,

(a) When the dissolution is not by the act, bankruptcy or death of a partner; or

(b) When the dissolution is by such act, bankruptcy or death of a partner, in cases where Section 34 so requires.

(2) With respect to persons not partners, as declared in Section 35.

Parallel references: cf. C. C. §§ 2453, 2461, 2462.

The purpose of this section is not to define the authority or power of a liquidating partner with regard to the actual process of liquidation or winding up. Such authority or power is governed by later sections of U. P. A.<sup>151</sup> The section seemingly provides that

<sup>150</sup> Miller v. Brigham (1875) 50 Cal. 615.

<sup>151</sup> See paragraph XLIV.



where dissolution is not by act, bankruptcy or death of a partner, one cannot ever rightly bind the others by any acts, except those in the nature of a winding-up. The causes of dissolution falling within this class would clearly include termination of a definite term or particular undertaking, external events making it unlawful for the business to be carried on, or decree of court. Presumably dissolution by "express" will would not fall into this class, but would be looked upon as dissolution by an act of a partner; yet the vagueness in the word "express" throws a doubt upon this interpretation.<sup>152</sup> C. C. section 2453 provides broadly when one partner may bind the others after dissolution, laying down rules that are substantially those of estoppel. It is silent as to when, if ever, such acts after dissolution cannot be cause of complaint among the partners. It does not make the distinction made in U. P. A. section 33 (1). C. C. section 2458 provides that after dissolution the powers and authority are only such as are prescribed by C. C. sections 2458 to 2462. These sections prescribe merely who may be a liquidating partner (sections 2459, 2460), what powers such liquidating partner has, and what he has not (sections 2461 and 2462), and reaffirm in section 2460 the rule of estoppel laid down in section 2453.<sup>153</sup> The sections leave wholly unsettled the question of rightfulness and wrongfulness as among the partners of acts done by one after dissolution, whatever the cause of that dissolution may be. Unless C. C. section 2458 be interpreted as making all acts, other than those strictly of liquidation, a wrong as between the partners—an interpretation obviously unfair in some cases, as will appear in the discussion of the next section—we must conclude that there is a wide gap in the provisions of the Civil Code, and that in giving attention to the rights of third parties after dissolution, the framers and adopters of the Code wholly forgot the partners themselves. Since the gap is not filled by decided cases, there necessarily remains a large interrogation point in our present law, which the adoption of U. P. A. would do much to erase.

#### XLIII. RIGHT OF A PARTNER TO CONTRIBUTION AFTER DISSOLUTION

U. P. A. SECTION 34. Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his co-partners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

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<sup>152</sup> See paragraph XL.

<sup>153</sup> But see paragraph XLIV for other possible meanings of this clause.

(a) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

(b) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.

Parallel references: Cf. sections referred to in paragraph XLII.

The preceding section of U. P. A. (section 33) is one principally of classification, and the purpose of this section is to lay down rules that apply when questions arise under one of the specified classifications. that is, questions concerning the rights of partners among themselves for acts done by one or more after dissolution due to "the act, death or bankruptcy of a partner" and not done as part of winding up the firm. In substance, a partner acting without knowledge or notice of the event causing dissolution has rights against his copartners if the act he does would have given him rights in case such dissolution had never occurred, that is, if the act is the sort of act described in U. P. A. section 18—"in the ordinary and proper conduct of its [the partnership's] business." As has been stated, the Civil Code leaves it uncertain how a partner will stand as to such acts, and U. P. A. is certainly an improvement.

The Commissioners who drafted U. P. A., in providing that a partner acting in ignorance of the death or bankruptcy of another does not shoulder the whole burden of that act, have truly enough departed from the weight of existing authority;<sup>154</sup> but who can deny that this departure is also a step in a parallel direction to that already taken in many states, including our own? As they themselves say, "the rule of the common law has been modified as to the law of agency" (C. C. section 2356). After all, the same considerations make a similar modification of partnership law desirable, for the partner is only an agent.<sup>155</sup>

#### XLIV. POWER OF PARTNER TO BIND PARTNERSHIP TO THIRD PERSONS AFTER DISSOLUTION.

U. P. A. SECTION 35. (1) After dissolution a partner can bind the partnership except as provided in Paragraph (3)

(a) By any act appropriate for winding up partnership

<sup>154</sup> E. g., see *Marlett v. Jackman* (1861) 3 Allen (Mass.) 287. See 30 Cyc. 653.

<sup>155</sup> For partner's right to contribution after dissolution: *Sears v. Starbird* (1889) 78 Cal. 225 (one partner having paid pre-dissolution debt sues other.)

affairs or completing transactions unfinished at dissolution;

(b) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution; and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under Paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

(a) Unknown as a partner to the person with whom the contract is made; and

(b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution

(a) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(b) Where the partner has become bankrupt; or

(c) Where the partner has no authority to wind up partnership affairs; except by a transaction with one who

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(II) Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in Paragraph (1bII)

(4) Nothing in this section shall affect the liability under Section 16 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business.

Parallel references:

to subsection (1) (a): C. C. §§ 2458, 2461, 2462.

to subsection (1) (b) : C. C. §§ 2417, 2453, 2454, 2460.

to subsection (2) (a) (b) : cf. C. C. § 2453.

to subsection (3) (a) (b) (c) : See references to subsection (1) (b).

to subsection (4) ; none.

This section follows the classification established by U. P. A. section 33, and lays down rules governing the rights of third parties for acts done by a partner after dissolution just as the preceding section follows the classification in section 33 and lays down rules governing the rights of the partners among themselves. Here, however, unlike U. P. A. section 34, we have matter to a certain extent already in the Civil Code, but generally speaking the provisions of U. P. A. are much fuller and the Civil Code leaves several ambiguities.

(1) clause (a). There is a marked contrast between the generality of the powers given in this subsection and the specific nature of those given in the corresponding sections of the Civil Code. A liquidating partner under the latter is limited to collection, compromise or release of debts due the partnership, the payment or compromise of debts owed by it, and the sale of its property (C. C. section 2461) ; he cannot create any new obligations or revive a debt barred by the Statute of Limitations (C. C. section 2462) ;<sup>156</sup> and under C. C. section 2458 he can do nothing else. What may a liquidating partner do with regard to contracts still executory by or to the partnership? These are not susceptible of collection or payment, and compromise or release might be financially improvident. Can the liquidating partner carry them through for the firm or accept confirmed performance by the third party? The Civil Code raises grave doubts as to his power to follow what may be the only wise business course.<sup>157</sup> U. P. A., however, is explicit in allowing him to complete transactions unfinished at dissolution. Again, suppose the partnership business involves many employees ; may the liquidating partner retain them to assist him, making new contracts of

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<sup>156</sup> The authorities are divided upon the question whether or not this power exists : Burdick, p. 246.

<sup>157</sup> See, on whole subject and pointing out narrowness of rules like our own, Burdick, pp. 235-240. The partnership may be sued by a third party who has continued to perform a contract executory on the part of both at the time of dissolution : *Asbestos Mfg. & Sup. Co. v. Lennig-Rapple Eng. Co.* (1914) 26 Cal. App. 177. Notwithstanding the lack of sanction in the Civil Code, the court in *Little v. Caldwell* (1894) 101 Cal. 553, seems to have recognized a binding obligation on a winding-up survivor to complete executory contracts.

hiring, and charge the partnership? This is doubtful under the Civil Code. On the other hand, U. P. A. seemingly makes it quite possible that winding-up proceedings will last far longer than under the Civil Code, though, of course,, it should be remembered that only appropriate measures are sanctioned, and presumably only those measures will be considered appropriate which place weight not merely upon realization of the greatest amount in money but upon the practical needs of the partners, or some of them, and their personal representatives.<sup>158</sup>

(1) clause (b), and (3). These sections should be read together ; and their seeming contradictions tend to disappear if one reclassifies their substance.

In effect, we will assume dissolution and an act by a partner after that happening. One finds that a third party has rights against the partnership if the transaction is of a sort that would bind the partnership before dissolution, and if the third party can bring himself under (1) clause (b) (I) or (II)—that is, show the requisite ignorance of *dissolution*—U. P. A. 35, subsection (1) clause (b). If, in addition, the act in question is by one not having authority to wind up, then the third party has these rights, if he can bring himself under (3) clause (c) (I) or (II)—that is, show not only the requisite ignorance of dissolution, but the requisite ignorance of want of authority as well. U. P. A. 35, subsection (3) (c). It should be noticed that subsection (3) is a limitation upon subsection (1). Because this section provides that a partner without authority to wind up cannot bind the firm unless the third party has the requisite ignorance of his want of authority, one must not infer that such an unauthorized partner can bind the firm, when there is the requisite ignorance, by *any sort of act*, or that a partner having such authority can bind the firm by *any sort of act*. What partners, authorized or unauthorized in winding up, can do to bind the partnership to third parties is laid down in subsection (1), and cannot be extended by saying that all not forbidden in subsection (3) is authorized. The U. P. A., in the careful distinction it thus makes, seems justified. Suppose after dissolution, a partner does an act in the ordinary course of business ; a third person with no

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<sup>158</sup> Powers of partners during liquidation: *Quinn v. Quinn* (1889) 81 Cal. 14, 22 Pac. 264 (sale of all property); *Boskowitz v. Nichol* (1892) 97 Cal. 19, 31 Pac. 732. Although C. C. § 2461 specifies only "debts," the liquidating partner may sue for a tort done the partnership: *Berson v. Ewing* (1890) 84 Cal. 89. As to effect of giving notes contrary to the terms of C. C. § 2462, see *Steinbach v. Smith* (1917) 34 Cal. App. 223, 167 Pac. 189.

knowledge of dissolution should hold the partnership. Subsection (1) clause (b).<sup>159</sup> A third person having knowledge of the dissolution but not of the partner's want of authority to wind up the firm, should be put upon inquiry. Not being able to bring himself under subsection (1) (b) he cannot recover. But suppose that the act in question is an act appropriate for winding up the partnership and that a third party deals with the partner in question, knowing of the dissolution, but ignorant of the want of authority; he can recover of the partnership, because he can bring himself under subsection (1) clause (a) and the proviso in 3 (c). He is not bound at his peril to find out which partner was authorized to act in liquidation.<sup>160</sup>

It is open to argument that Civil Code sections 2453 and 2460 are to the same effect, but it is by no means clear. The first of these two sections is the counterpart of U. P. A. 35 subsection (1) clause (b), although there are certain minor differences as to knowledge and notice which will be mentioned in the next paragraph. Civil Code section 2453, also, does not, as U. P. A. does, characterize the sort of act by one partner that will bind the others to the ignorant third party after dissolution, although of course it can not be that every act will have this effect, but only those in the ordinary course, etc. Otherwise the Civil Code and U. P. A. are to the same effect. When, however, one considers the case of a third party, aware of dissolution but ignorant as to the partner who has been designated to liquidate the partnership, one turns from C. C. section 2453 to section 2460 and back again with a great deal of hesitation. Is the last clause of the latter section merely a reaffirmation of the principle laid down in the former? Doubt as to the antecedent of the word "thereof" in C. C. section 2460 makes this last clause all but meaningless. To paraphrase, perhaps the section means that the acts of partners not authorized to liquidate bind the partnership in favor of persons who believe in good faith that they (the partners) have authority to act. This is assuming that the acts are valid as to the other partners though the section does not say so. But even with this assumption and even if the above paraphrase is correct, we have advanced little, for what is "good faith"? Is a third party, knowing of dissolution but neglecting to inquire who is authorized to liquidate, in good faith? The Civil Code is full of gaps and doubts; the greater explicitness of U. P. A. is here all in its favor.

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<sup>159</sup> Burdick, p. 73.

<sup>160</sup> Burdick, p. 241.

U. P. A. section 35, subsections (1) clause (b) (I) and (II) as to knowledge of dissolution and subsections (3) clause (c) (I) and (II) as to knowledge of lack of authority, make the usual distinction between previous dealers and non-dealers—a distinction also made by C. C. section 2453. Both limit prior dealers to those who have extended credit,<sup>161</sup> but there are otherwise slight differences. U. P. A. speaks of persons who have extended credit to the partnership, and the Civil Code of persons who have had dealings with *and* given credit to the partnership, as though more than the mere giving of credit was necessary. Does this exclude banks who lend money to the partnership, and include only those who on credit sell to or build for the partnership? The mere extending of credit should be enough. Again, the Civil Code speaks of those having dealings, etc., during the existence of the partnership. Since dissolution does not terminate, seemingly those having dealings after dissolution can bring themselves under this section. This may often be only fair, as in the case where there is a dissolution, a continuance of the appearance of a partnership, and then the formal notice of dissolution. Persons dealing with the firm in this interim should be entitled to actual notice quite as much as those dealing with it before. The Civil Code, in this respect, seems preferable to U. P. A., which entitles only those who dealt with the firm before dissolution to actual notice. With regard to non-dealers, the Civil Code requires publication in every county where the partnership had a place of business, and U. P. A. in every place where partnership business was regularly carried on. The former makes it easier to ascertain where notice should be published; the latter makes it a little more probable that interested non-dealers will read the news of dissolution. It is impossible to say which is preferable, for the Civil Code will be complied with when publication is made at one end of a long county at the other end of which was the place of business; and under U. P. A., claims may be made by non-dealers in places through which a commercial traveller of the firm, with his office in his hat, passed infrequently but regularly.<sup>162</sup>

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<sup>161</sup> Upon which there is elsewhere a conflict: Burdick, p. 75.

<sup>162</sup> The notice need not be formal,—a refusal to pay further debts is sufficient: Cf. *Irvine & Muir Lumber Co. v. Holmes* (1915) 26 Cal. App. 453. Other cases illustrating doctrine that third party with notice of dissolution cannot hold one partner for act of another done after dissolution and not an ordinary act of winding up: *Brush v. Maydwell* (1859) 14 Cal. 208; *Dupuy v. Leavenworth* (1861) 17 Cal. 263; *Smith v. Kansas Street Imp. Co.* (1898) 120 Cal. 517. Cases where third party held outgoing partner for acts done after dissolution because not notified: *William v. Bowers* (1860) 15 Cal. 321.

There are two other sections of the Civil Code separated from section 2453 in their places in the Civil Code, but in nature like it. One of these is C. C. section 2417, which provides that renunciation by a partner of future profits exonerates him from liability to third persons notified of the renunciation; another is C. C. section 2454, to the effect that a change of name indicating the withdrawal of a partner is notice of such withdrawal to persons to whom it is communicated. These sections seem scarcely necessary, because withdrawal or renunciation means dissolution and notice of dissolution is provided for in C. C. section 2453—nor is there any intimation that notices of dissolution when communicated or published by the withdrawing or renouncing partner has less effect than when similarly advertised by all the partners; and therefore U. P. A., in omitting to cover what they cover in the same words cannot be looked upon as changing the law in California.<sup>163</sup>

(3) clause (a) Let us now assume, that the effective fact causing dissolution was that the business became unlawful. If the act in question was one appropriate to wind up the business it binds the firm; otherwise the firm is not bound. In addition, suppose that the third party had extended credit, was without actual notice, and extended credit again in connection with an act that could not have shown that the business had become lawful. Should not the firm be bound, even when the act is in ordinary course, quite as much as when it is only appropriate to wind up the business?<sup>164</sup> U. P. A. section 35 subsection (3) clause (a) provides otherwise, unless we adopt an interpretation that will be discussed.<sup>165</sup> Conceivably, the subsection might be construed to apply when the act in question showed that it was illegal for the firm still to carry on business or "where the partnership is dissolved" *by court order*, being understood—a matter of public record—; but such a construction is rather forced. It is hesitatingly suggested that in this connection, U. P. A.

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Cf. *White v. Kincaid* (1919) 180 Cal. 135, 179 Pac. 685. It is otherwise as to acts in the course of liquidation: *Hawn v. The 76 Land and Water Co.* (1887) 74 Cal. 418 (release by one is binding). For a release that was not in the course of liquidation and therefore could not be availed of by third party knowing of dissolution: *Hill v. Maryland Casualty Co.* (1915) 28 Cal. App. 422. As to evidence of actual notice: *Treadwell v. Wells* (1854) 4 Cal. 260. As to who are new dealers: *Treadwell v. Wells* (1854) 4 Cal. 260. Old dealers: *Ruhe v. Wells* (1853) 3 Cal. 151.

<sup>163</sup> *Burdick*, p. 75.

<sup>164</sup> See for a full exposition of this view, *Judson A. Crane*, 28 *Harvard Law Review*, 762, 781.

<sup>165</sup> See page 329, *infra*.



leaves something to be desired.<sup>166</sup> It is probably still open to contend that in California the third party will have firm creditor rights, for there is nothing in the Civil Code to lead one to believe that C. C. section 2453 will not continue to apply, whatever the cause of dissolution.<sup>167</sup>

Subsection (3) clause (b) lays down that where a partner has become bankrupt that partner cannot bind the partnership by any act. Is this because bankruptcy is a matter of public record and the creditor is charged with notice of it and at his peril deals with that partner? If so, why should not such bankruptcy be notice to another partner? We have seen that he is not deprived of rights against his fellows unless he have knowledge or notice of the bankruptcy. The question is not one of the liability of the bankrupt but of other partners. The rule here laid down seems hardly fair; and the possibility of what seems to the author a preferable view in California under present law exists with reference to this subsection quite as much as to the preceding one.

The rules thus laid down in U. P. A. section 35, subsection (3) clauses (a) and (b) would be far less harsh if the exceptions (I) and (II), which are attached to subsection (3) clause (c), attached equally to (a) and (b). A court would certainly hesitate to make such an interpretation; for the exceptions speak of "his want of authority," linking them more directly to subsection (c) which speaks directly of a partner with "no authority", than to subsections (a) and (b) which do not mention "authority" (though they imply the lack of it) and which can be given a meaning without the exceptions.

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<sup>166</sup> Mr. William Draper Lewis, in his answer to Mr. Crane's criticisms referred to in n. 164, *supra*, and hesitatingly adopted by the writer, emphasizes the fact that we have here to do with unauthorized acts, and that the question is "whether the law shall or shall not give to those who deal with one of two persons carrying on . . . a business . . . for a wholly illegal purpose advantages which it gives partnership creditors." Mr. Lewis believes not, because the creditor's innocence is often difficult of proof and because the creditor's right is due to the right of each partner to have joint assets applied to joint debts and not to an equity inherent in the claims of the joint creditors. He also suggests that to give the creditor rights means penalizing the innocent inactive partner for not taking a precaution (i. e., giving notice) against his partner's doing not only an authorized but an unlawful act. 29 *Harvard Law Review*, 291, 302-305. The author believes, however, that the true basis of liability is the estoppel-motive, and that whether or not this is so is the crux of the matter, and that it comes perilously near begging the question to stigmatize as unlawful (void?) the jural relation, whatever it may be, between creditor and inactive partner. (But see *Simpson v. Shaw* (1869) 101 *Mass.* 145.)

<sup>167</sup> Outside of California, the law seems to favor Mr. Lewis. See cases cited in n. 137, *supra*, and 28 *Harvard Law Review*, 782.

The above views are advanced with no little doubt, and the writer suggests that persons who have had the interest and courage to read these articles thus far give this matter careful study before agreeing with him. Even if he be wrong, he is vain enough to believe that some criticism is justified of provisions that have puzzled him as much as these have.

(2) Subsection (2) is a succinct enunciation of principles well recognized in general partnership law, but having apparently only a partial counterpart in California. The basis for the liability of partners for the act of a fellow after dissolution, which act is not one in winding-up and is therefore contrary to the authority really vested in that fellow, is the normal and ancient notion or principle that also underlies estoppel in pais, doctrines as to ostensible agency, and many other rules. The liability, one might say, is created by a modified estoppel.<sup>168</sup> This subsection brings the law closer to pure estoppel in pais than does the first part of C. C. section 2453, for it limits the liability of unknown partners who have not contributed in any degree to the firm's business reputation to what they actually put into the firm. In short, they are freed from personal liability because they have made to the third party no representation direct or indirect that they or their influence were in the firm.

There is no section of the Civil Code expressly preserving the third party's right to pursue partnership property; there is merely section 2453 declaring that a general partner is liable for acts done after dissolution (assuming, of course, no knowledge, etc.) only when the third party believed that he was still a member of the firm. Since section 2453 is, except for acts in liquidation, the only section relating to liability for acts done after dissolution, and since an obligation so created can scarcely be said to be a debt or obligation of the partnership under C. C. sections 2405 and 2442, it is difficult to see why on the face of the Civil Code the inactive unknown partner does not rank at least on equal terms with the post-dissolution creditor; but this is so opposed to usual doctrines<sup>169</sup> that one can scarcely doubt that the court, despite the Code, would find a way to postpone him. U. P. A. has an advantage over the Civil Code in marking that way clearly without unduly increasing the liability of the inactive partner.

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<sup>168</sup> Mr. Crane, 28 Harvard Law Review, 762, 783; Burdick, p. 74; but see n. 166.

<sup>169</sup> Burdick, pp. 307-312, particularly p. 311.

(4) This subsection is evidently inserted out of fear lest statutory provision in cases of modified estoppels will work havoc in situations requiring the application of the principles of pure estoppel. The very slight cost of the extra few inches of ink in making this clear probably outweighs the also very slight danger of doubt on this question now latent in C. C. section 2453, which has no similar addendum.

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(To be concluded)